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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 892

ANGELA MORRIS AMADO ROCHA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

ANTONIO DE J. CARDOZO,
Attorney for Petitioner.

MARTIN T. CAMACHO,
Of Counsel.

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IMMIGRATION AND NATURALIZATION SERVICE,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on October 14, 1965.

Opinions Below.

Opinion of the United States Department of Justice, Board of Immigration Appeals, dated March 11, 1965, appears in Record Appendix (hereinafter called "RA"), pp. 1-4, and a prior opinion from the same Board of Appeals, dated September 24, 1964, appears on pages 6-11 of RA. The opinion of the Court of Appeals, printed in Appendix hereto, Appendix B, *infra*, p. 9 *et seq.*, is reported at 351 F. 2d 523.

Jurisdiction.

The jurisdiction of the Court of Appeals was invoked pursuant to Review Act of 1950 (64 Stat. 1129, 5 U.S.C. § 1031) and pursuant to the Judicial Review of Order of Deportation and Exclusion (8 U.S.C. § 1105a) as amended.

The judgment of the Court of Appeals was entered on October 14, 1965. The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. § 1254 (1). And see further 5 U.S.C. § 1040.

Questions Presented.

Whether or not the petitioner is entitled to her claim to United States citizenship; specifically:

(*a*) Whether the Denationalization Act of March 2, 1907, c. 2534, § 3, 34 Stat. 1228, was unconstitutional so far as it affected the citizenship of the petitioner.

(*b*) Whether the petitioner, because of her personal status, had obtained derivative citizenship through her mother under paragraph 2 of section 205 of the Nationality Act of 1940 and the Act of June 25, 1936, 49 Stat. 1917, wherein the petitioner contends the latter statute automatically and retrospectively restored United States citizenship to her mother.

(*c*) Whether the petitioner is entitled to derivative citizenship under the Act of June 25, 1936, 49 Stat. 1917, wherein her mother automatically reacquired United States citizenship, together with the Act of May 24, 1934, § 5, 48 Stat. 797, where a child born abroad of a United States citizen mother acquired citizenship of the mother under conditions set forth therein.

(*d*) Whether, under the circumstances and because of the harshness and unusual hardship involved in petitioner's deportation, the United States is estopped to deny citizenship to the petitioner.

Statutes Involved.

See Appendix A

Statement of the Case.

This is an action wherein the petitioner has been aggrieved by an order for her deportation and expulsion from the United States and seeks to have this order set aside on the ground that she is a United States citizen, and, further, the petitioner seeks to have a determination as to her claim to citizenship.

Petitioner was born on May 6, 1931 in Portugal (RA 27, 33). Petitioner's mother was born on September 3, 1901, in New Bedford, Massachusetts (RA 34). She was married on November 20, 1916, in New Bedford to one Paulo Amado, a native of Portugal, who never became a United States citizen (RA 40). Petitioner's father was a Portuguese citizen, but not her mother's husband (RA 47, 28). Petitioner's natural parents never married (RA 28). Her natural father, Luiz Amado, was never in the United States and was not a citizen of the United States (RA 29, 30).

Petitioner was issued a United States passport by the United States Consulate at Lisbon, Portugal (RA 20, 21, 31, 32), under section 205 of the Nationality Act of 1940 (RA 39). Petitioner has been denied United States citizenship and is under order of deportation (RA 3-4, 5, 6-11).

Reasons for Granting Writ.

It has been said that United States citizenship is a most precious right, a priceless possession, and that is exactly what is involved in the instant case.

The United States Supreme Court has sought with great effort to give lucid definition to principles governing Con-

gressional action with respect to legislation dealing with matters of denationalization, expatriation—in short, deprivation of citizenship. It is clear from a reading of the decisions that in many respects this most vital subject still remains rather fuzzy and uncertain.

The petitioner has raised several issues, but her principal claim to citizenship is her contention that section 3 of the denationalization Act of 1907, which deprived her native-born United States American mother of citizenship, was unconstitutional in that it constituted discrimination so unjustifiable as to be violative of due process under the United States Constitution.

She further bases her claim on the series of decisions which have emanated from the United States Supreme Court in the past decade, and especially in view of the decision in the case of *Schneider* v. *Rusk*, 377 U.S. 163, decided in 1964. In that case the Supreme Court declared unconstitutional a statute which provided for the denationalization of naturalized citizens residing continuously for three years in the country of birth. The Court said that such a statute constituted discrimination so unjustifiable as to be violative of due process. If this be so, and the Supreme Court declares it to be so, then there is much reason in what Mr. Justice Clark said in his dissenting opinion in the *Schneider* case, *supra*, at pages 169-170, when he declared that the *Schneider* case presented a much stronger basis for upholding the constitutionality of the denationalization legislation therein involved than did the case in *Mackenzie* v. *Hare*, 239 U.S. 299, wherein the Supreme Court upheld the constitutionality of section 3 of the Act of March 2, 1907, which expatriated native-born citizen women because of marriage to aliens.

The present situation with regard to the powers of Congress in dealing with matters of denationalization and ex-

patriation can be substantially clarified if the United States Supreme Court would review and re-examine the rationale on which it upheld as constitutional section 3 of the denationalization Act of 1907. If it did so, there would be a clearer definition and focusing of the powers of Congress in this field of legislation. The Court of Appeals in the instant case did not wish to be the catalyst in doing this, for the *Mackenzie* case has not as yet been directly overruled.

The central issue in expatriation cases is whether there is conduct "importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship" (*Perez* v. *Brownell*, 356 U.S. 44, 61), for legislation which expatriates and denationalizes "must keep within the limits of palpable reason and rest upon some modicum of discoverable necessity" (*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 188-189).

It is very difficult to imagine a piece of legislation on the matter of expatriation so palpably ill-advised and ill-founded and absurd as that of section 3 of the denationalization Act of 1907. Further, said section 3 not only deprived native-born citizen women of their rights of citizenship because of matrimony to aliens, but it attempted to confer upon them the citizenship status of their alien husbands, as if the United States had any basic right to confer citizenship of another country on an expatriated native-born female citizen. Apparently, in these cases, Congress, by the Act of 1907, § 3, created stateless females. The Supreme Court should wipe out this legislative anachronism of the past which still plagues and clouds the present.

The instant case presents a number of important and significant questions, but none has the great import of national impact and public interest as the one above described.

Conclusion.

Wherefore your petitioner respectfully prays that this petition for a writ of certiorari be granted.

ANTONIO DEJ. CARDOZO,
Attorney for Petitioner.

MARTIN T. CAMACHO,
Of Counsel.

Appendix A.

Statutes Involved.

ACT OF MARCH 2, 1907, CHAPTER 2534, SECTION 3, 34 STAT. 1228.

Section 3 of the Act of March 2, 1907 provides: "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a Consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

NATIONALITY ACT OF 1940, CHAPTER 876, SECTION 205.

"The provisions of Section 201, subsections (c), (d), (e) and (g), and Section 204, subsections (2) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent Court.

"In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status." 54 Stat. 1139-1140; 8 U.S.C. § 605.

ACT OF JUNE 25, 1936, 49 STAT. 1917.

". . . that hereafter a woman, being a native-born citizen, who has or is believed to have lost her United States

citizenship solely by reason of her marriage prior to September 22, 1922, to an alien, and whose marital status with such alien has or shall have been terminated shall be deemed to be a citizen of the United States to the same extent as though her marriage to said alien had taken place on or after September 22, 1922 . . ."

ACT OF MARCH 2, 1907, AS AMENDED BY ACT OF MAY 24, 1934, SECTION 5.

"That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father *or the mother:* Provided, that such naturalization or resumption shall take place during the minority of such child; and provided further, that the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States." 48 Stat. 797; 8 U.S.C. § 8.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6505.

ANGELA MORRIS AMADO ROCHA,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR REVIEW OF THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

Before ALDRICH, *Chief Judge*, J. WARREN MADDEN, *Senior Judge*,* and JULIAN, *District Judge*.

Martin T. Camacho for petitioner.

John M. Callahan, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for respondent.

OPINION OF THE COURT.

October 14, 1965.

ALDRICH, *Chief Judge*. This is a petition to review a judgment of the Board of Immigration Appeals affirming

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*Sitting by designation.

a denial of a certificate of citizenship and an order of deportation. The case presents the question whether a statute that was repealed in 1922 was unconstitutional so far as it affected the citizenship of the petitioner. The facts are undisputed. Petitioner's mother was born in this country in 1901. In 1916 she married a Portuguese citizen and subsequently moved, apparently permanently, to Portugal. Petitioner was born in Portugal in 1931. Her father was a Portuguese citizen, but was not her mother's husband. Her mother was divorced in 1932. Petitioner first came to this country in 1961.

By Act of March 2, 1907, ch. 2534, §3, 34 Stat. 1228, petitioner's mother, by marrying a foreign national, lost her United States citizenship and acquired that of her husband.[1] This law was repealed by Act of September 22, 1922, ch. 411, §7, 42 Stat. 1022, but not retroactively. If born abroad to two foreign nationals petitioner obviously was not a United States citizen merely because her mother had once been one. Indeed, it is conceded that in 1931 petitioner would not have been a United States citizen even if her mother had retained her citizenship. Petitioner's claim, so far as we could find it to have any merit, is based upon the Nationality Act of 1940, ch. 876, §205, 54 Stat. 1139, which stated that persons in petitioner's status are "held to have acquired at birth[2] . . . [the] nationality

[1] "Section 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

[2] This enactment is unusual in that it does not make residence in the United States before the foreign-born minor reaches a certain age a condition of citizenship. Compare prior act, Act of May 24, 1934, §5, 48 Stat. 797, and the 1952 Act, 8 U.S.C. §1401(b).

status" of the mother. This statute was repealed by the Act of June 27, 1952, ch. 477, §403, 66 Stat. 280, but not retrospectively. *Id., section* 405(c).

Necessarily underlying the applicability of the 1940 Act to the petitioner is the contention that section 3 of the 1907 Act, in depriving her mother of citizenship on marriage, was unconstitutional. In *Mackenzie* v. *Hare,* 1915, 239 U.S. 299, a unanimous court upheld its constitutionality. It is true that this unanimity has not characterized the decisions of the last decade upholding, *Perez* v. *Brownell,* 1958, 356 U.S. 44 (5-to-4; four opinions); *Marks* v. *Esperdy,* 1964, 377 U.S. 214 (4-to-4), or holding unconstitutional, *Trop* v. *Dulles,* 1958, 356 U.S. 86 (5-to-4; four opinions); *Kennedy* v. *Mendoza-Martinez,* 1963, 372 U.S. 144 (5-to-4; four opinions); *Schneider* v. *Rusk,* 1964, 377 U.S. 163 (5-to-3), congressional expatriation legislation. No majority has questioned the authority of *Mackenzie,* however, and, indeed, it has been relied upon in several recent decisions. *Perez* v. *Brownell, supra; Savorgnan* v. *United States,* 1950, 338 U.S. 491; see also *Kennedy* v. *Mendoza-Martinez, supra,* at 187; *cf. Perez* v. *Brownell, supra,* at 69-73 (Warren, C.J., dissenting).

Petitioner relies principally on *Schneider* v. *Rusk, supra,* for the proposition that *Mackenzie* is no longer law. The statute considered in *Schneider* was directed solely to naturalized citizens, and certainly basic to the decision was the court's condemnation of this discrimination. It is true that the dissenting opinion expressed the view that the reasoning of the court extended *a fortiori* to the 1907 Act upheld in *Mackenzie.* The opinion of the court did not mention the earlier case, however.

It is clear that the decision itself in *Schneider* did not overrule *Mackenzie.* It is likewise apparent from the cases cited above that the limits of congressional authority to deprive citizens of their nationality have yet to be defined.

We do not feel we should attempt to be the catalyst when to do so would involve express departure from a case which has never, in a majority opinion of the court, been questioned.

Petitioner's other points do not warrant discussion.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 892

ANGELA MORRIS AMADO ROCHA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the judgment of the Court of Appeals for the First Circuit, affirming the denial of a certificate of citizenship and sustaining an order of deportation. The opinion of the court of appeals is reported at 351 F. 2d 523.

The essential facts are undisputed. Petitioner's mother was born in the United States in 1901. In 1916, she married a Portuguese citizen and subsequently moved to Portugal. She was divorced in 1932. Petitioner, an illegitimate child, was born in Portugal in 1931. She first came to the United States in 1961, long after reaching her majority.

Under the Act of March 2, 1907, ch. 2534, 34 Stat. 1228, petitioner's mother, by marrying a foreign

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national, lost her United States citizenship. Petitioner's claim to citizenship rests primarily on the contention that this Act, which was sustained in *Mackenzie* v. *Hare*, 239 U.S. 299, should now be held unconstitutional and thus ineffective to have deprived her mother of United States nationality. On this basis, petitioner argues that she acquired United States citizenship at birth under Section 205 of the Nationality Act of 1940, ch. 876, 54 Stat. 1139, which conferred United States citizenship on an illegitimate child "if the mother had the nationality of the United States at the time of the child's birth and had previously resided in the United States."

There is no occasion for this Court to reexamine its ruling in *Mackenzie* v. *Hare*, *supra*. The Act of 1907, here involved, was repealed in 1922 and liberal provisions were enacted, in the 1922 Act and thereafter, by which women who had lost their nationality solely through marriage could resume their United States citizenship. See, *e.g.*, Section 324 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1435.[1] The validity of the 1907 Act must be judged

[1] Petitioner, in her questions (Pet. 2) presents, although she does not argue, a contention based on one such provision—the Act of June 25, 1936, 49 Stat. 1917 (which was amended in respects not here material by the Act of July 2, 1940, 54 Stat. 715). Petitioner argues that her mother automatically reacquired United States nationality under that Act, as if she had never lost it, and therefore petitioner acquired United States nationality at birth. Petitioner quotes (Pet. 7) only that part of the 1936 act which provided that "hereafter" a woman who lost citizenship solely by reason of her marriage to an alien prior to 1922 should be deemed to be a citizen of the United States as if her marriage had taken place after 1922. She

in relation to its effective period—from 1907 to 1922—when the legal status of women, in this country and elsewhere, was markedly different from the situation at present. For example, the Nineteenth Amendment to the Constitution, prohibiting discrimination in voting rights on the basis of sex, was not effective until 1920. The decision of this Court in *Schneider* v. *Rusk*, 377 U.S. 163, declaring unconstitutional a statute providing for denationalization of aliens residing for three years in the country of former nationality does not impair the ruling of *Mackenzie* v. *Hare*, that, as of its day, the 1907 Act was a reasonable exercise by Congress of the power to regulate the relations of this country to others. See *Perez* v. *Brownell*, 356 U.S. 44.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1966.

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neglects to quote the proviso that "no such woman shall have or claim any rights as a citizen of the United States until she shall have duly taken" an oath of allegiance. There is no claim that petitioner's mother took such an oath. While the Immigration and Naturalization Service took the position that this Act reconferred citizenship on the woman as of 1936, the courts held that citizenship was not regained until after the oath was taken. *Shelly* v. *United States*, 120 F. 2d 734 (C.A.D.C.); *In re Shee Mui Chong Yuen's Repatriation*, 73 F. Supp. 12 (D. Hawaii). On neither interpretation was the mother a citizen of the United States at the time of petitioner's birth.

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